95-905

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TECHNICAL SERGEANT JOSE L. MARTINEZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when it found the evidence at the Appellant's court-martial legally sufficient to find him guilty of negligent homicide beyond a reasonable doubt.

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---

PETITION FOR WRIT OF CERTIORARI

The petitioner, Technical Sergeant Jose L. Martinez, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 13 September 1995.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 42 M.J. 327 (1995), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Military Review, issued on 3 May 1993, is located at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 13 September 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (West Supp. 1995) and 10 U.S.C. § 867(a) (West Supp. 1994).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person, shall . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

During the early morning hours of 3 November 1990, the appellant's closest friend, Sergeant Armando Sauceda, died as a result of a motor vehicle accident. Sgt Sauceda was driving appellant's car at the time of the accident. The appellant and Sgt Sauceda had been drinking alcoholic beverages, celebrating Sgt Sauceda's scheduled permanent change of station from Zaragoza AB, during the evening prior to the accident.

The appellant arrived at Sgt Sauceda's dormitory room at approximately 2200 hours the evening prior to the accident. When appellant arrived at the dormitory room, Sgt Sauceda, a SSgt Grendzinski, and an Airman Delgado were already in the room. Sgt Sauceda offered the appellant a mixed drink and the appellant accepted. The appellant did not see Sgt Sauceda drinking anything at that time, although the other two men testified that they were drinking with the deceased prior to the appellant's arrival. Shorly after the appellant arrived at the dormitory room, the four men proceeded to the NCO Club on Zaragoza Air Base.

While at the NCO Club, from sometime shortly after 2000 hours (10 p.m.) until approximately 1230 (12:30

a.m.) hours the next morning, the appellant estimated that he and Sgt Sauceda had approximately three drinks each. One of the bartenders at the club, SSgt Hadley, testified that he only served Sgt Sauceda one drink that evening and that Sgt Sauceda did not appear drunk when he served him the drink.

The appellant, Sgt Sauceda, Airman Delgado, SSgt Grendzinski, and an Airman Foley left the Club at approximately 0100 (1 a.m.) hours to go to the chow hall to eat breakfast. At the chow hall, Sgt Sauceda ate a full breakfast of eggs, hashbrowns, coffee, and toast. After leaving the chow hall the appellant, Sgt Sauceda, Airman Delgado, and Sgt Foley returned to the dormitory. Airman Delgado testified that Sgt Sauceda appeared to be "fine" and his demeanor "wasn't anything abnormal" after leaving the Club that evening and while at the dormitory, although he qualified his statement by saying that his judgment was not so reliable since he was drunk. There was no evidence that the deceased drank any more alcohol after leaving the Club at approximately 0100 hours.

SSgt Grendzinski testified that Sgt Sauceda's condition was "fine" when he last saw him at the chow hall. Airman Foley testified that Sgt Sauceda was not slurring his speech, stumbling or falling down, or evidencing any change in personality than normal when he last saw him in the dormitory before the appellant and Sgt Sauceda left for downtown. There was no evidence that the appellant was intoxicated or impaired.

Shortly after returning to the dormitory, Airman Foley and Airman Delgado went to sleep in the dormitory room that Airman Foley and Sgt Sauceda shared. Airman Foley apparently told Airman Delgado that he could sleep in Sgt Sauceda's bed. The appellant and Sgt Sauceda remained in the dayroom of the dormitory, where they watched TV and dozed on and off until approximately 0300 (3 a.m.) hours, when they headed for downtown.

The prosecution called a Sgt Margaret Randolph, who testified that she spoke to Sgt Sauceda on the telephone at approximately 0230 (2:30 a.m.) hours. She stated that Sgt Sauceda "sounded very drunk." However, the defense brought out the fact that Sgt Randolph had had an extra-marital affair with the deceased, was extremely distraught by his death, and therefore may have been looking to blame someone for his death.

Another prosecution witness, Sergeant David Cordner, was alone in his dormitory room on this Friday night and looking for individuals who were causing trouble in the dormitory. He testified that he saw Sgt Sauceda in the bathroom between 0130 and 0200 hours "staggering" in front of the mirror. Sgt Cordner admitted on cross-examination he didn't render any assistance to Sgt Sauceda because he "didn't feel it was needed" since "he [Sgt Sauceda] appeared to me to be doing okay."

While the appellant and Sgt Sauceda were in the day-room, the appellant testified that Sgt Sauceda kept asking to go downtown. The appellant initially ignored the requests, but ultimately acceded to Sgt Sauceda's requests. The following colloquy occurred between appellant and the trial defense counsel concerning the driving arrangements that evening:

> Q: On the way to the car, again, did you see any signs of him being drunk?
>
> A: None at all.
>
> Q: Okay. When you got into the car, what happened after that?
>
> A: When we got in the car and he—Well, he didn't decide to drive, he always drove, so he took the keys. I don't remember whether I gave him the keys after I left the barracks or when we got to the car. So he took the keys.
>
> Q: Was it unusual for him to drive?
>
> A: No, ma'am, he always drove whenever we went out, because I don't know my way downtown. I always get lost.

Upon leaving the base, Sgt Sauceda drove through the front gate of the base, which required a gate guard to pull up a barrier to let them through the gate. The appellant stated that Sgt Sauceda was driving normally and was not weaving at all when they left the base. The appellant added that Sgt Sauceda had no problem negotiating a very sharp curve before getting onto the highway to Madrid.

The appellant then recounted the tragic moments leading up to the accident:

> We got onto the highway, started going. After you get on the highway, there's a gas station there, okay, and I remembered I turned that way (moving his head slightly downward), and at that point I opened my glove compartment. That's where I keep my radio. And I asked Mando if he wanted to hear some music, you know, just hear some music, there's no noise here. So I turned the radio on and the local—Our station was pretty hazy, so I started looking for a better station. What happened at that time, you know, I was too busy tuning the radio. (The accused became emotional and couldn't talk). The Court was recessed for a brief period, at which point the appellant continued.
>
> I was tuning my radio trying to get a clear station. And then at one point, I heard Mando say, "Oh shit." (the witness is trying very hard to control himself) I tried to look up when he said that, but at that time the car went down and bounced back up. So it was pretty violent—like we hit a ditch or a big hole. Went down and I went down also. When I came back up, all I could see was a guardrail coming at us. And that's what I remember. We were going from side to side, and when we finally came to a stop. I called "Armando," "Armando." I looked to the driver's side and he wasn't there. So I tried to open my door. I couldn't open it. So I went out through his door outside. Armando's lying on the concrete

and the car—(The witness was crying and could not continue).

The accident report revealed that the vehicle struck the median guardrail, flipped over onto its roof, entered the opposite lanes of traffic, and hit the guardrail on the far shoulder of the opposite side of the roadway. Sgt Sauceda was ejected from the vehicle during the accident and sustained head injuries ultimately resulting in his death at a Spanish hospital at approximately 0500 (5 a.m.) that morning.

The appellant was later charged with involuntary manslaughter by allegedly committing the culpably negligent act of allowing Sgt Sauceda to drive his vehicle while Sgt Sauceda was under the influence of alcohol. The appellant was ultimately convicted of the lesser included offense of negligent homicide.

The actual cause of the accident was vigorously disputed at trial. The prosecution contended that it was due to the intoxication of Sgt Sauceda and his resultant impaired ability to drive. The defense contended that Sgt Sauceda was not intoxicated or, at least, did not objectively appear intoxicated to those around him shortly before the accident.

Assuming that Sgt Sauceda was impaired, such impairment was not the proximate cause of Sgt Sauceda's death. The defense introduced evidence to show that the poor condition of appellant's automobile was the proximate cause of Sgt Sauceda's death irrespective of whether Sgt Sauceda's faculties were impaired by alcohol consumption.

Master Sergeant Steven R. Holm, the only accident reconstruction expert to testify at the appellant's court-martial, testified that in his expert opinion, any one of the following faulty conditions of the automobile or a combination of them was the proximate cause of the accident:

(1) the automobile's non-uniform and tread-worn tires;

(2) the automobile's steering wheel, which was installed after market and was smaller than the origial wheel, thus exaggerating the response to a sudden turn of the wheel and causing the driver to more easily lose control;

(3) the automobile's suspension system and, specifically, the right A-arm, which may have been damaged prior to the accident; and,

(4) the fact that the high beams on the vehicle did not work, thus limiting the driver's visibility range at night.

Master Sergeant Holm also testified that the mechanics of the accident were inconsistent with accidents involving intoxicated drivers and that the reactions of Sgt Sauceda to the perceived danger were inconsistent with those of an intoxicated driver.

Finally, dark tinted prescription glasses, which Sgt Sauceda at times wore, were found next to his body. There was further evidence that Sgt Sauceda had not been wearing his seat belt at the time of the accident (the appellant was), and that the high beams on the car's headlights had not been used. The question of Sgt Sauceda's possible contributory negligence, looming so large that it effectively severed the appellant's negligence as a superseding intervening cause, was discussed by Judge Wiss in his concurring opinion at the United States Court of Appeals for the Armed Forces.

The appellant was acquitted by the court-members of involuntary manslaughter (10 U.S.C. § 919(b)) (West Supp. 1994), but was found guilty of the lesser included offense of causing the death of Sgt Sauceda by simple negligence (negligent homicide) (10 U.S.C. § 934) (West Supp. 1994).

On appeal to the Air Force Court of Military Review, the Air Force Court did not address the later issue specified by the United States Court of Appeals for the Armed Forces. In granting review of the petition for re-

view filed by the Appellant, the United States Court of Appeals for the Armed Forces specified the following issue:

> WHETHER APPELLANT MAY BE CONVICTED OF NEGLIGENT HOMICIDE UNDER THE FACTS OF THIS CASE.

The United States Court of Appeals for the Armed Forces, in affirming the findings and sentence, concluded that the appellant had been given sufficient notice under the Fifth Amendment that the conduct in which he engaged in on 3 November 1990 was "a punishable service disorder under Article 134." Further, the Appellant had been provided sufficient notice under its prior decisions in *United States v. Brown*, 22 M.J. 448 (C.M.A. 1986) and *United States v. Gordon*, 31 M.J. 30 (C.M.A. 1990). *Martinez, supra.* The Court did not specifically address the question as to whether or not the facts admitted into evidence at the appellant's court-martial were sufficient for any rational trier of fact to find the appellant guilty of negligent homicide beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

REASON FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED WHEN IT FOUND THERE WAS SUFFICIENT EVIDENCE UPON WHICH ANY RATIONAL TRIER OF FACT COULD HAVE FOUND THE APPELLANT GUILTY OF NEGLIGENT HOMICIDE BEYOND A REASONABLE DOUBT.

In *Jackson, supra,* the Supreme Court reaffirmed that it was "axiomatic that a conviction upon a charge not made constituted a denial of due process." 443 U.S. 314, *citing Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948) and *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.E.2d 207 (1978). Thus, no person "shall be made to suffer the onus of a criminal

conviction except upon sufficient proof." *Jackson*, 443 U.S. 316. The test to apply in determining the legal sufficiency of a conviction was defined in *Jackson* as whether, after viewing the evidence in the light most favorable to the prosecution, any rationale trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In the appellant's case, the evidence does not support a finding beyond a reasonable doubt that the appellant acted negligently when he provided his car keys to his friend in order to drive he and his friend into town.

Taken as a whole, in the light most favorable to the prosecution, the facts discussed under the Statement of the Case did not establish that the appellant was negligent beyond a reasonable doubt.

CONCLUSION

As the Supreme Court noted in *Jackson*, "[a] properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury." 443 U.S. 317. Appellant Court judges are no less fallible. The appellant's conviction for negligently causing the death of his friend should not stand.

Respectfully submitted,

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December 1995

APPENDIX A

U.S. COURT OF APPEALS
FOR THE ARMED FORCES

No. 94-0021
CMR No. 29440

UNITED STATES,
Appellee,

v.

JOSE L. MARTINEZ,
Technical Sergeant U.S. Air Force,
Appellant.

Argued April 25, 1995

Decided September 13, 1995

OPINION OF THE COURT

SULLIVAN, Chief Judge:

1. During the spring of 1991, appellant, a technical sergeant, was tried by a general court-martial at Zaragoza Air Base, Spain. The members of his court-martial found him guilty of negligent homicide, in violation of Article 134, Uniform Code of Military Justice, 10 USC § 934. On May 8, 1991, he was sentenced to a bad-conduct discharge, a fine of $1000, and reduction to E-1. The convening authority approved this sentence on August 9, 1991. The Court of Military Review [1] affirmed on May 3, 1993.

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[1] *See* 41 MJ 213, 229 n. * (1994).

2. On May 26, 1994, this Court granted review[2] on the following issue raised by appellate defense counsel:

> WHETHER APPELLANT'S CONVICTION WAS ADJUDGED DUE TO UNLAWFUL COMMAND INFLUENCE WHEN THE WING COMMANDER CIRCULATED A LETTER TO ALL COMMANDERS AND AGENCIES ON ZARAGOZA AIR BASE, EIGHT DAYS BEFORE APPELLANT'S TRIAL BEGAN, WHICH ESSENTIALLY TOLD THE COMMANDERS TO GET TOUGH ON DUI CASES AND ADMONISHED THEM NOT TO MISPERCEIVE HOW SERIOUSLY THE "WING LEADERSHIP" TAKES SUCH MATTERS.

We also specified the following issue for review:

> WHETHER APPELLANT MAY BE CONVICTED OF NEGLIGENT HOMICIDE UNDER THE FACTS OF THIS CASE.

We hold that any unlawful command influence in this case was shown by the Government to be harmless beyond a reasonable doubt. *United States v. Thomas*, 22 MJ 388 (CMA 1986), *cert. denied*, 479 U.S. 1085 (1987). We also hold that the facts of this case permit appellant's conviction for negligent homicide, in violation of Article 134. *See United States v. Gordon*, 31 MJ 30 (CMA 1990); *United States v. Brown*, 22 MJ 448 (CMA 1986).

3. The Court of Military Review found the following facts concerning the granted and specified issues:

> In the early morning hours of 3 November 1990, Technical Sergeant Jose L. Martinez gave his car keys to Sergeant Sauceda so Cauceda could drive the two to a disco in downtown Zaragoza, Spain. Traveling toward town at about 3:00 A.M., the car flipped

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[2] This case was argued at the Air Force Academy. *See* 34 MJ 233, 234 n. * (CMA 1992).

over into the oncoming lanes. Sergeant Sauceda was thrown from the vehicle and died as a result of his injuries.

* * * *

The appellant and Sergeant Sauceda gathered with some friends in Sauceda's dormitory room on 2 November 1990, to celebrate Sauceda's upcoming departure from Zaragoza Air Base. After sharing a one-liter bottle of whiskey, the group went to the Noncommissioned Officer's (NCO) Club where they bought a few more rounds of drinks. Then, they went to the base dining hall for some food. When they left the dining hall, the appellant and Sauceda returned to Sauceda's dormitory. Between 1:30 and 2:00 A.M., Sauceda was seen "staggering" in the dormitory's shared bathroom. A female friend he called about 2:30 A.M., said he sounded "very drunk." *Soon thereafter, the appellant gave his keys to Sauceda who drove the two off the base in the appellant's car.*

* * * *

On March 5, 1991, the Zaragoza wing commander issued a "We Care About You" letter to his command after a series of alcohol-related accidents, presumably including this one, resulted in several deaths. The letter expressed the wing leadership's concerns and reviewed the administrative and nonjudicial measures being set in motion to reduce alcohol-related incidents.

We differ with the appellant defense counsel's assessment that "this letter cast an atmosphere of command influence that hung over appellant's trial like the Sword of Damocles." The letter specifically says that "Punishment for DUI [driving under the influence] will be individualized under the guidelines of the UCMJ." As counsel suggests, the letter was circulated across the base "eight days before the

> appellant's trial began." However, due to the delays . . ., the members were not actually empaneled until almost 2 months after the letter was written. Then, in an extensive *voir dire*, the members stated repeatedly they would only consider the facts of the case before them. Their actions remained fair and impartial throughout the trial. We find nothing from the 5 March letter that had the impermissible effect of bringing "the commander into the deliberation room," and nothing amounting to unlawful command influence over these proceedings. *United States v. Kirkpatrick*, 33 MJ 132, 133 (CMA 1991); *United States v. Grady*, 15 MJ 275, 276 (CMA 1983); *United States v. Fowle*, 7 USCMA 349, 351, 22 CMR 139, 141 (1956).

Unpub. op. at 1-2, 8 (emphasis added).

I

4. Appellant was charged with involuntary manslaughter, in violation of Article 119, UCMJ, 10 USC § 919. In particular, he was charged with *"by culpable negligence*, unlawfully kill[ing] Staff Sergeant Armando Sauceda by allowing Sergeant Armando Sauceda to drive [appellant's] vehicle while under the influence of alcohol." (Emphasis added.) The maximum punishment for this offense was a dishonorable discharge, confinement for 3 years, and total forfeitures.[3] Para. 44e(2), Part IV, Manual for Courts-Martial, United States, 1984. The members, however, found appellant guilty of the lesser offense of negligent homicide, in violation of Article 134. In particular, he was found guilty of "unlawfully kill[ing] Sergeant Armando Sauceda by *negligently* allowing Sergeant Armando Sauceda to drive [appellant's] vehicle while under the in-

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[3] This has been changed effective for offenses committed after December 9, 1994. Exec. Order No. 12, 936, § 4(c), 59 Fed. Reg. 59081.

fluence of alcohol." (Emphasis added.) The maximum punishment for this offense is a bad-conduct discharge, confinement for 1 year, and total forfeitures. Para. 85e, Part IV, Manual, *supra*.

5. On appeal appellate defense counsel asserts that appellant cannot be convicted of negligent homicile for lending his car to a drunken driver who kills himself in an automobile accident. He first argues that such conduct is not criminal in any jurisdiction civilian or military. *Cf. United States v. Brown*, 22 MJ 448 (CMA 1986) (conviction of servicemember for involuntary manslaughter upheld for death of a third person killed by drunken driver given keys by that servicemember). He further contends that, even if such conduct was criminal in the military, he had no notice of criminality. Finally, he asserts that "public policy" dictates that Article 134 should not be expansively construed by this Court to criminalize his conduct.

6. We note that it has long been established in military law that negligent homicide is a punishable service disorder under Article 134. *See United States v. Kick*, 7 MJ 82, 84 (1979). There, this Court said:

> Article 134, UCMJ, and its statutory predecessor Article of War 96, proscribe all disorders and neglects by a member of the services which prejudice the good order and discipline in the armed forces and all conduct of a nature to bring discredit upon the armed forces. It must be construed in light of authoritative interpretations of military law, existing service customs and common usages. *See Parker v. Levy, supra*, 417 U.S. [733] at 753-54, 94 S.Ct. 2547 [(1974)]; *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 15 L.Ed. 838 (1857). This Court in *United States v. Kirchner*, 1 USCMA 477, 4 CMR 69 (1952), specifically found that negligent homicide by a service member could be properly punished under Article 134, UCMJ,

as such a disorder. Past court-martial practices with respect to the prosecution of a negligent homicide under Article of War 96, and up to that time under Article 134, UCMJ, were noted in detail in that opinion. A more recent decision from the United States Army Court of Military Review clearly articulated the reasons for its prosecution under Article 134, UCMJ:

> There is a special need in the military to make the killing of another as a result of simple negligence a criminal act. This is because of the extensive use, handling and operation in the course of duties of such dangerous instruments as weapons, explosive, aircraft, vehicles, and the like. The danger to others from careless acts is so great that society demands protection.

United States v. Ballew, CM 434077 (unpublished), p.2 (ACMR 16 July 1976).

(Footnotes omitted.)

7. Appellant asserts, however: "There is no known case in any jurisdiction of anyone being convicted of homicide for letting an intoxicated person drive his vehicle where that person then died as a result of his own negligence." Final Brief at 10. Be that as it may, we noted in *United States v. Kick, supra* at 83-84, that the absence of civilian law proscribing this conduct is not determinative. Instead, our concern is whether this conduct violates substantive military law which in turn rests on military tradition, necessity, and experience. *See Parker v. Levy*, 417 U.S. 733, 749-51 (1974). The decisions of this Court in *United States v. Brown*, 22 MJ 448 (1986), and *United States v. Gordon*, 31 MJ 30 (1990), clearly recognized the negligence inherent in appellant's conduct[4]

[4] Judge Cox aptly noted the nature of this negligence in *United States v. Brown*, 22 MJ 448, 450 (CMA 1986). He said:

and the appropriateness of including such hazardous conduct toward a fellow soldier [5] within the scope of Article 134. *See generally Solorio v. United States*, 483 U.S. 435 (1987) (Uniform Code of Military Justice applies to servicemember's conduct no matter where it occurs.

8. Appellant next asserts that even if his conduct was proscribed by Article 134, he had no notice of its criminality. This argument must be rejected for the reasons stated by the Supreme Court in *Parker v. Levy*, *supra*. Appropriate notice was provided by our decisions noted above and paragraph 85, Part IV, Manual, *supra*.

9. Appellant's final argument is that the criminalization of his conduct by this Court would be "against public policy." He notes the absence of statutes creating criminal liability for behavior such as appellant's and suggests that it is "undesirable" to "have a duty to protect the health and safety of another who chooses, and is allowed, to drink and drive. . . ." and "kill[s] themselves as a result of their own negligence." He urges that this Court leave such policy decisions to Congress in its future modifi-

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Heedlessly turning over the keys to his chariot of death, appellant did not even take the elemental precaution of inquiring how much alcohol Robinson [the driver] had actually consumed.

[5] The Bible (Genesis 4:9) asks the question, "Am I my brother's keeper?" In my personal view, within the confines of this case, this question is to be answered in the affirmative. There are instances in military life where the high standards set for membership in the profession of arms require that Armed Forces members not only take care of themselves but also their fellow warriors. *See United States v. Lawson*, 36 MJ 415 (CMA 1993); *cf.* the national slogan "Friends don't let friends drive drunk" (somewhat related civilian concept). I think the high standards of conduct are traits of the American soldier. I think these standards are major factors in the high regard that America's Armed Forces enjoy in the world today. Again, in my view, the instant case reflects these high standards of conduct that the American military sets for itself under the authority granted in the Uniform Code of Military Justice.

cations of the Uniform Code of Military Justice. Final Brief at 20-22.

10. Appellant's argument ignores the fact that this Court does not make or set public policy. That is Congress' job under Article I, § 8, Clause 14 of the United States Constitution, and it has performed its duty in this regard by enacting Article 134 and its statutory predecessors. That legislative body placed the responsibility on the factfinder at a court-martial to determine whether conduct such as appellant's is a service disorder punishable at a court-martial. The Supreme Court has also held that this statute is constitutional, assuming adequate notice is provided with respect to the particular offenses punished under it. *See Parker v. Levy, supra.* Finally, the President in the Manual for Courts-Martial has long recognized the offense of negligent homicide as a punishable service disorder. *See* Appendix 6c, Sample Specification 144, Manual for Courts-Martial, United States, 1951. Our authority is limited to examining the findings of guilty entered under this codal provision and ensuring that they comply with existing law. Art. 67(c), UCMJ, 10 USC § 867(c)(1989). They do here.

II

11 . The second issue in this case is whether appellant's wing commander unlawfully influenced his court-martial such that its findings and sentence should be set aside. *See* Art. 37(a), UCMJ, 10 USC § 837(a); *United States v. Kirkpatrick,* 33 MJ 132 (CMA 1991). The basis for this attack on appellant's conviction is a "We Care About You" letter dated March 5, 1991, signed by Colonel Mangis, Commander, 406th Tactical Fighter Training Wing (USAFE). This letter was issued 8 days before the initial Article 39(a), UCMJ, 10 USC § 839 (a), session in this case and essentially announced "a get tough on DUI cases" policy for Zaragoza Air Base. (*See* appendix.)

12. Appellate defense counsel asserts that "the decision of the Air Force Court of Review evidence a complete failure to conduct a thorough review of the record and meaningful analysis of this issue." Final Brief at 25. He notes that all the members of appellant's court-martial admitted that they were aware of the "get tough" policy and, therefore, it was readily apparent to any reasonable person that the commander was "dictating the results" of his client's trial. Final Brief at 31, 32. He finally asserts that "this case would not have gone to court if it occurred at any other time or at any other base in the military." Final Brief at 34. We disagree.

13. Taking his last argument first, we note that the decision to refer this case to trial by court-martial was that of Major General Daniel, Commander, Sixteenth Air Force (USAFE), Torrejon Air Base, Spain. It is not clear how a "get tough on DUI cases" letter from Colonel Mangis, a commander of lower grade, would influence his superior officer's referral decision. *United States v. Johnston*, 39 MJ 242 (CMA 1994). Furthermore, we have reviewed this letter, which is attached as an appendix to this opinion, and conclude that it conveys no express or implied message that appellant or any other presumably innocent servicemember should be found guilty without regard to the evidence presented at a court-martial. Finally, with respect to sentence, we note this policy letter was not directed at this court-martial to ensure that severe punishments for drunk-driving offenses be imposed by the court-members. *See United States v. Kropf*, 39 MJ 107, 109 (CMA 1994); *cf. United States v. Kirkpatrick*, 33 MJ 132 (CMA 1991) (military judge instructs members on command policy); *United States v. Grady*, 15 MJ 275 (CMA 1983) (trial counsel argued command policy to members).

14. Admittedly, this policy letter suggests to potential court members reading it what their court-martial sentences for a drinking-and-driving offense should be. This

is unlawful command influence in violation of Article 37. Nevertheless, in *United States v. Thomas*, 22 MJ 388 (1986), *cert. denied*, 479 U.S. 1085 (1987), this Court rejected a *per se* reversal rule where the members of a court-martial were simply exposed to comments suggesting unlawful command influence. *See also United States v. Allen*, 33 MJ 209 (CMA 1991) (rejected *per se* rule where applied to military judge), *cert. denied*, 503 U.S. 936 (1992). Instead, this Court has held that full disclosure of the matter on the record; assessment of the members' ability to render an impartial judgment; and proper instruction on the members' judicial duty would normally suffice to ensure a military accused has a fair trial. This case complies with that decision.[6]

15. Nevertheless, we are puzzled by the wing staff judge advocate (SJA)'s apparent failure to make it "absodutely clear" to the members of this command that courts-martial were not covered by this letter. *Cf. United States v. Sullivan*, 26 MJ 442 (CMA 1988). When one reads paragraph 2(d) of this letter (*see* appendix), one might

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[6] The military judge stated to counsel:

> All right. I have previously denied your motion for a change of venue until we had a chance to *voir dire* the panel members. Having heard the members' responses, I again will deny the motion for a change of venue. I am aware that all the members perceive the wing commander's policy as a result of all these deaths from DWIs as a serious matter and a get tough policy. I don't find that, in itself, disqualifying. It would be disqualifying if any of these members felt that as a result of that policy they had to vote in a particular way or reach a particular finding. I think of those members of whom that question was asked, I don't think we have any members who feel constrained by that commander's policy to have to vote or decide in a particular manner.
>
> So, I don't see in this particular case, as a result of what knowledge the members do have, if any, of the accused and this accident, of the commander's policy, that there is such a great prejudice that the accused cannot obtain a fair and impartial trial. For that reason, the motion for a change of venue is denied.

think that the commander is setting out a minimum punishment schedule for courts-martial. Where was the SJA? We know the typical SJA is not a "potted plant." [7] SJAs should be constantly vigilant to avoid such loose or ambiguous language in a command-wide policy letter from the commander. In any event, we are satisfied beyond a reasonable doubt that appellant was not prejudiced by the wing commander's letter. *United States v. Thomas, supra.*

The decision of the United States Air Force Court of Military Review is affirmed.

Judges COX, CRAWFORD, and GIERKE concur.

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[7] The term "potted plant" is used in America's image-based society to distinguish passive non-players ("is a potted plant") from people of action ("is not a potted plant"). It is derived from Brenden V. Sullivan, Jr.'s, response to Senator Inouye, when the Senator was attempting to limit Mr. Sullivan's role in protecting his client (Oliver North) from what Mr. Sullivan perceived as unfair questioning by the Senate staff during the 1987 Irangate Hearings: "Well sir, I'm not a potted plant. I'm here as the lawyer. That's my job."

[DoD Logo]

APPENDIX

DEPARTMENT OF THE AIR FORCE
Headquarters 406th Tactical Fighter Training Wing
(USAFE)
APO New York 09286-5000

Reply to Attn of CC
Subject "We Care About You"

[05 Mar. 1991]

To Distribution A-C

1. Following our recent tragic vehicle accidents, I feel it is necessary to take significant actions. We, as individuals, as a community, or as an Air Force cannot accept this type of loss. First, I believe that we have a good set of programs for accident prevention, and for control of alcohol use. The failure seems to be in individual application or in perception of how serious wing leadership takes them. To make it absolutely clear, I am taking the following actions and instituting the following programs.

2. First, the negative:

a. The unit commanders and first sergeants from the units which had the recent fatalities will present a complete briefing, on their participant's(s') involvement in the accident, to the CC/CV/DCSs/SEA no later than 5 Mar 91.

b. In all DUI cases, beginning with the most recent on 13 Feb 91, the DCS, unit commander, first sergeant, driver, and any passengers will brief the senior staff the second wing staff meeting from the date of the incident.

c. The wing standard for DUI will be loss of all on and off base driving privileges for one year. Spanish drivers licenses obtained through the 406 TFTW will be returned to the Security Police Pass & ID office for safe-

keeping. This is retroactive for all persons currently under suspension. In specific cases where I deem it necessary for performance of duties, GOV driving waivers may be given. These requests will come through the DCSs.

d. Punishment for DUI will be individualized under the guidelines of the UCMJ. For a first-time offender committing an Article 111, UCMJ violation with no personal injuries or property damage, an appropriate punishment should be given. I consider the following as a starting point:

1) NCOS—Reduction in grade and forfeiture of $500.

2) Officers—Forfeiture of $1,500.

3. Second, the preventive:

a. All people involved in alcohol-related incidents will be referred to Social Actions for an evaluation.

b. Unit commanders and first sergeants will review the records of all assigned personnel to identify those with poor driving history. They will also attempt to identify those with proven poor driving attitudes. These individuals will be counseled and disciplined, as necessary. A record of counseling will be kept.

c. Unit commanders will document a counseling session with all personnel reaching two months from PCS or upon Early Return of Dependents, which emphasizes the high risk during these periods. They and unit first sergeants will monitor the off-duty actions of these individuals to identify excessive behaviors.

d. The NCO Club bar will stop serving alcoholic drinks at midnight. Non-alcoholic drinks, food, and entertainment may continue as late as desired.

e. A senior NCO will be assigned duty to observe the NCO Club bar. The duties will include:

1) Advising people who are getting drunk to take it easy.

2) Advising people leaving who appear to be under the influence to not drive.

3) Calling the Security Police if people fail to take advice.

f. We will institute a process of driving through cones/random checks of people entering and departing base as sobriety tests.

g. Security police and selected officers/NCOs will join in random checks for seat belt use. Warnings will not be given. Violators of my seat belt policy letter will be given the five day/30 day/one year driving suspension.

4. Finally, the positive is that we will initiate a "We Care About You" program which encompasses all of the present programs plus:

a. Publishing a "Safe Partying" guideline.

b. Developing a safe presentation on the effects/dangers of alcohol use, indicators of alcohol abuse, intelligent ways to use alcohol, and smart ways to party which will be given at all unit commander's calls.

c. Increasing emphasis on identifying potential alcohol abusers before a serious problem develops or the person gets into trouble.

d. Placing specific emphasis on removing peer pressure to drink or drink more.

e. Establishing a wing policy that the unit commander/DCS will personally approve the type/quantity of alcohol served at unit functions. Non-alcoholic beverages will not only be offered, but pushed. Non-alcoholic wine will be available on every table where wine is offered.

5. These actions are sharp, but not extreme. I believe, however, that they take advantage of the very unfortunate opportunity that our fine young comrades gave us. No program will prevent a reoccurrence. Only a significant change in the social mindset of our people can accomplish

that most desirable of ends. We must decide, as a community and as individuals, that irresponsible drinking and irresponsible driving are just not acceptable. I have done my part as commander. Now I plead with each of you to join me as individuals to make sure that we never suffer tragedies like these again.

/s/ Edward V. Mangis
EDWARD V. MANGIS, Colonel, USAF
Commander

WISS, Judge (concurring):

16. As to the granted issue, I agree with the majority's treatment of appellant's claims made thereunder. Also, I agree with its conclusion as to the specified issue that, notwithstanding an absence of prejudice in appellant's court-martial, the complained-of portion of the commander's letter was an unlawful command effort to exert influence over courts-martial, including appellant's. *See* Art. 37(a), Uniform Code of Military Justice, 10 USC § 837(a).

17. I write separately to address an aspect of the granted issue that troubles me considerably in this case—but one which the defense did not surface at trial and did not pursue on appeal. It has to do with the relationship among the concepts of proximate cause, immediate cause, independent and intervening cause, and contributory negligence. In my opinion, this case illustrates the need for military judges to be especially sensitive to the duty to tailor instructions to the evidence in the case. *Cf. United States v. Martinez*, 40 MJ 426, 431 (CMA 1994); *United States v. Groce*, 3 MJ 369, 370-71 (CMA 1977). That extra effort will help members *understand* instructions within the context of the evidence they have heard—instructions that, when given in general terms, seem overly complex and convoluted.

I

18. The evidentiary contest at trial focused on whether the victim was impaired by alcohol and, relatedly, whether appellant knew of the impairment; and whether the victim was contributorily negligent so as to sever the proximate-cause linkage between appellant's negligence and the victim's death. The alleged negligence of the victim himself included, in addition to his drunkenness and his driving while in that state: not wearing a seat belt at the time of the accident; wearing sunglasses while driving at night, thereby reducing his vision; and not using the high beam

on the car's headlights, which further reduced his ability to see.

19. After defining and contrasting culpable negligence (required for the charged offense of involuntary manslaughter) and simple negligence (required for the lesser-included offense of negligent homicide), the military judge offered these instructions:

> In argument counsel mentioned the terms "proximate cause," "intervening cause." The act of the accused in this case must not only amount to culpable negligence, but must also be a proximate cause of the death of Sergeant Sauceda. Proximate cause means that the death must have been the natural and probable result of the accused's culpability negligent act. The *proximate cause* does not have to be the only cause, but it *must be a contributory cause which plays an important part in bringing about the death. Now, if the death of Sergeant Sauceda occurred only because of some unforeseeable, independent, intervening cause which did not involve the accused,* then the accused may not be convicted of involuntary manslaughter. Again, *the burden is on the prosecution to prove beyond a reasonable doubt that there was no intervening independent cause, and that the accused's culpable negligence was a proximate cause of the victim's death.* Any questions about that instruction, gentlemen? Okay, no questions.
>
> *Finally, there is evidence in this case raising the issue of whether the deceased, Sergeant Sauceda, failed to use reasonable care and caution for his own safety. If the accused's culpable negligence was a proximate cause of death, then the accused is not relieved of criminal responsibility just because the negligence of the deceased may also have contributed to his death.* The conduct of the accused [DECEASED?] is, however, important on the issue of whether the accused's culpable negligence, if any, was the proximate cause

of death. Accordingly, a certain act may be a proximate cause of death even if it was not the only cause, as long as it is a direct or contributing cause and plays an important role in causing the death. *An act is not a proximate cause of death if some other force independent of the accused's act intervened as a cause of death.* Is that instruction clear?

* * * *

Now as the facts in this case relate to this lesser-included offense [of negligent homicide], the matters of proximate cause and intervening cause also apply to the lesser-included offense. That is, the act alleged must not wholly [ONLY?] amount to simple negligence, but it must be the proximate cause of Sergeant Sauceda's death. This means that the death of Sergeant Sauceda must have been the natural and probable result of the accused's negligent act. In determining this issue, you should consider all facts and circumstances.

Now the accused will be relieved of criminal responsibility for the death of the victim if the death was the result, again, of some unforeseeable, independent intervening cause which did not involve the accused. If the victim died only because of this independent intervening cause, then the act of the accused was not the proximate cause of the death, and the accused cannot be found guilty of negligent homicide. Again, the burden is on the government to establish beyond a reasonable doubt that there was no independent intervening cause and that the accused's negligence was a proximate cause of the death of the victim.

Finally, as it may relate to any issue of contributory negligence in this case, there is some evidence in this case which raises the issue of whether the deceased, again, failed to use reasonable care and caution for his own safety. *If the accused's negligence*

> *ws a proximate cause of the death, the accused is not relieved of criminal responsibility just because the negligence of the deceased may have contributed to the death.* The conduct of the deceased is, however, again important on the issue of whether the accused's negligence, if any, was a proximate cause of death. Accordingly, a certain act may be a proximate cause of death, even if it is not the only cause, as long as it is a direct or contributing cause and plays an important role in causing the death. Thus an act is not the proximate cause of the death if there is that other force independent of the accused's act which in that other force intervened as the cause of death.

(Emphasis added.)

20. After the members had deliberated for about 2 hours, they returned to court to ask for a lunch break. The request granted, the members reconvened about an hour later with a request that, prior to continuation of deliberations, the military judge "go over with us again the definitions of simple and culpable negligence."

21. The military judge repeated the instructions that he had given earlier on these subjects and, again at the members' request, reinstructed on certain voting procedures and on the elements of involuntary manslaughter. Regarding the elements, the military judge instructed, in part, that the members had to find that "the death [of Sergeant Sauceda] resulted from an act of the accused, in this case giving his keys to the deceased while the deceased was under the influence of alcohol. . . ."

22. At this point, the members renewed their deliberations. Nearly 2½ hours later they returned with a finding of guilty of the lesser-included offense of negligent homicide.

II

23. Except as to the capitalized words in brackets in the quoted instruction, ¶ 19, the instructions on negligence,

proximate cause, intervening cause, and contributory negligence substantially followed the model instructions on those subjects found in paragraphs 3-88 and 3-154, Military Judges' Benchbook at 3-177 and 3-309 (Dept. of the Army Pamphlet 27-9 (Change 2) (15 Oct. 1986)). I take no issue here with those instructions, either as to their correctness or, in most instances, as to their adequacy.

24. In some cases, however, the evidence that the members must sort out to find the facts is so complex that common sense ought to suggest that the military judge should tailor these technical and conceptual instructions so that the members can *understand what they mean* in the context of the case at hand. I believe that this is such an instance.

25. For example, if not at the outset then at least when the members indicated their confusion by returning to the courtroom for reinstruction, the military judge should have considered instructions substantially as follows:

> In order to find the accused guilty of the charge of either involuntary manslaughter or negligent homicide, you must find:
>
> FIRST: that the victim's drunkenness—rather than some unforeseeable, independent, intervening force—was the immediate cause of the accident that resulted in his death; and,
>
> SECOND: that the accused knew or should have known that the victim was drunk, as I have defined that term for you; and,
>
> THIRD: that the accused was negligent in giving his keys to the victim, considering the accused's state of knowledge of the victim's condition, and that negligence was the proximate cause (as I have defined that term for you) of the accident and death; and

> FOURTH: that the victim's drunkenness, his failure to wear a seat belt, and his actions that affirmatively diminished his ability to see (that is, his wearing tinted glasses while driving at night and his failure to use the high beams on the car's headlights)—if you find these as facts—*was not* contributory negligence; or
>
> If you find these facts and determine that the victim *was* contributorily negligent, then you must further find that his negligence did not "loom so large" in comparison with the accused's negligence that the accused's negligence did not play an important role in causing the death. That is, that the victim's contributory negligence was not so substantial in comparison with the accused's negligence that it effectively severed the accused's negligence as a proximate cause of the accident leading to the victim's death.

(This is not a quotation.)

26. In other words, even if appellant was negligent in giving his keys to a person he knew or should have known was intoxicated, that negligence is not a proximate cause of the subsequent accident and death unless the driver's drunkenness, itself, was the immediate cause of the accident. If, notwithstanding the driver's intoxication, the accident occurred due to some other circumstances, then appellant's negligence is not a proximate cause. Judge Cox writing for a unanimous Court in *United States v. Lingenfelter*, 30 MJ 302, 306 (1990), offered these analogous illustrations:

> For example, had it been a parachutist that dropped suddenly out of the sky in front of appellant's vehicle (assuming appellant had no reason to know he was in the middle of a drop zone) and had the circumstances been such that no one driving lawfully and exercising all due care could have avoided striking the parachutist given the minimal notice, it would not

> have been the fact of the drunken driving that "thereby caused" the injury.
>
> Similarly, if one bent on self-destruction had hidden behind an obstacle by the roadside and had hurled himself into appellant's on-rushing vehicle, and the same result would have occurred had the driver been sober and driving with all due care, it would not have been the fact of the drunken driving that "thereby caused" the injury. . . .

27. Further, even if appellant was negligent, if the victim was contributorily negligent and if that contributory negligence was so substantial, when compared to the accused's negligence, that the latter became relatively unimportant as a contributing cause, then appellant's negligence was not a proximate cause. As Judge Cox wrote in *Lingenfelter*, after a short discussion of *United States v. Cooke*, 18 MJ 152 (CMA 1984):

> Whether appellant's drunken driving "play[ed] a material role in" Mr. Strubbe's demise or whether Mr. Strubbe's own alleged negligence "loom[ed] so large" as to relegate appellant's conduct to less than "a substantial factor in the" death are calls to be made in the first instance by the factfinder.

30 MJ at 307. As applied to this case: Whether appellant's negligence in giving his car keys to his drunk friend played a material role in the subsequent accident and death of his friend—or whether, instead, his friend's own negligence in driving while intoxicated, without wearing a seat belt, while wearing glasses with tinted lenses at night, and not using the high beams on the car, "loom[ed] so large" as to relegate appellant's negligence to less than "a substantial factor in the" accident and resultant death—are calls for the members to make.

III

28. As I mentioned at the outset of this opinion, however, appellant lodged no objection to any of the relevant instructions nor asked for any more-tailored ones. Even on appeal, the thrust of his complaints is not the absence of understandable instructions, made so by being tailored to the evidentiary context of the case. Since the instructions that were given are legally correct and not so convoluted as to be ineffective, I conclude that there is no appellate error worthy of reversal.

29. Nonetheless, I encourage military judges to use the opportunity in their instructions to offer truly helpful guidance to the members and to make sense, in the context of the case at hand, out of instructions that are frequently fraught with unfamiliar concepts, terms of art, or other legalese.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 29440

3 May 1993

UNITED STATES

v.

Technical Sergeant JOSE L. MARTINEZ, FR535-56-0029
UNITED STATES AIR FORCE

Sentence adjudged 8 May 1991 by GCM convened at Zaragoza Air Base, Spain. Military Judge: Dennis L. Olson.

Approved sentence: Bad-conduct discharge, fine of $1,000, and reduction to E-1.

Before

O'HAIR, McLAUTHLIN, and HEIMBURG
Appellate Military Judges

OPINION OF THE COURT

McLAUTHLIN, Senior Judge:

In the early mornng hours of 3 November 1990, Technical Sergeant Jose L. Martinez gave his car keys to Sergeant Sauceda so Sauceda could drive the two to a disco in downtown Zaragoza, Spain. Traveling toward town at about 3:00 A.M., the car flipped over into the oncoming lanes. Sergeant Sauceda was thrown from the vehicle and died as a result of his injuries.

A general court-martial composed of officer and enlisted members found the appellant not guilty of involuntary manslaughter, but guilty of the lesser included offense of negligent homicide. Appellant's approved sentence consists of a bad-conduct discharge, a fine of $1,000, and reduction to E-1. In written and oral argument, appellate defense counsel attack several aspects of this case. We conclude, however, that no relief is warranted and affirm the appellant's conviction.

FACTS

The appellant and Sergeant Sauceda gathered with some friends in Sauceda's dormitory room on 2 November 1990 to celebrate Sauceda's upcoming departure from Zaragoza Air Base. After sharing a one-liter bottle of whiskey, the group went to the Noncommissioned Officer's (NCO) Club where they bought a few more rounds of drinks. Then, they went to the base dining hall for some food. When they left the dining hall, the appellant and Sauceda returned to Sauceda's dormitory. Between 1:30 and 2:00 A.M., Sauceda was seen "staggering" in the dormitory's shared bathroom. A female friend he called about 2:30 A.M. said he sounded "very drunk." Soon thereafter, the appellant gave his keys to Sauceda who drove the two off base in the appellant's car.

Dr. Tellado performed an autopsy of Sauceda's body at Torrejon Air Base on 5 November. He told the court he took a blood sample from the chest's pleural cavity that revealed 1.9 milligrams of ethyl alcohol per milliliter of blood.[1] Another doctor informed the members that someone with this blood-alcohol level would have been

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[1] Later analysis of the same sample at an Army laboratory in Germany disclosed levels of 1.86 and 1.72 milligrams of alcohol per milliliter of blood. An Army laboratory officer testified that the differences between the readings were "statistically insignificant."

"mildly drunk" with "some effect on their reflexes" and "ability to react."

Dr. Tellado testified the best place to take a blood sample during the autopsy would have been from the heart or aorta. However, Spanish officials had already conducted an autopsy on Sauceda's body and had emptied the heart and aorta of their blood contents. Dr. Tellado explained that when blood is taken from the pleural cavity there is always a concern that gastric or stomach contents can mix with the blood in that area and contaminate the sample. Thus, if there was alcohol in the stomach contents, it might seep into the blood in the pleural cavity and give a false blood alcohol reading. However, in Dr. Tellado's opinion, no such contamination took place in this case.

THE DENIED DEFENSE EXPERT

A preassembly Article 39(a), UMCJ, session was held on 13 March 1991. The court-martial then recessed to allow the defense to obtain an accident reconstruction expert. The court reconvened on Tuesday, 30 April 1991, and continued through the rest of that week. On Friday, 3 May, after the judge denied the defense motion to suppress the blood sample report, the defense counsel moved for the production of Dr. Vasilliades, a forensic toxicologist, based on what the defense called "newly discovered evidence." The defense counsel told the judge she had learned about the possibility of contamination of the pleural cavity blood sample for the first time when she interviewed Dr. Tellado the evening of April 30th. After that interview, she said she spoke with Dr. Vasilliades who told her the sample was unreliable.

The trial counsel responded that this evidence was not "newly discovered" and contended the defense had long been aware of the contamination issue. In addition, trial counsel noted there was no mention in the defense motion of the content of Dr. Vasilliades' testimony or of the cost

to get him to trial. After hearing argument from both sides, the judge denied the defense motion as untimely. The judge also noted that other means were available, through cross-examination of Dr. Tellado and scientific articles defense counsel had shown the judge, to attack the accuracy of the blood sample readings.

On 4 May, the defense counsel renewed the motion for Dr. Vasilliades after receiving a copy of the "autopsy protocol" in which Dr. Tellado wrote "Gastric contents cannot be ruled out as a possible contaminate for the ethanol level." The judge again denied the motion "for the prior reasons." Later that day, after the government finished presenting its case, the defense counsel renewed her request for Dr. Vasilliades. It was, once again, denied.

We will overturn a trial judge's decision denying an accused's witness request only if we find an abuse of discretion. *United States v. Tangpuz*, 5 M.J. 426 (C.M.A. 1978). Here, we find no abuse of discretion in view of the belated timing of the request, the impact of further delay on the trial proceedings, the uncertain content of this expert's testimony, the failure to show when he might be able to testify, and the availability of other means of attacking the reliability of the blood sample.

REQUEST FOR CONTINUANCE & INEFFECTIVE ASSISTANCE

When the military judge denied her first request for Dr. Vasilliades, trial defense counsel said she felt incapable of properly assisting the appellant and requested a continuance. After hearing the government's opposition, the military judge denied defense counsel's request and the trial continued. The appellant contends this deprived him of the effective assistance of counsel. We disagree.

An appellant who alleges ineffective assistance of counsel has a heavy burden. The Supreme Court has established a two-pronged test for such allegations:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

The first facet of the *Strickland* test is not present here. Trial defense counsel's cross examination of Dr. Tellado contradicted her professed inability to extract the weak points of the blood alcohol results from this expert. She engaged him in a detailed discussion of the possible contamination of the pleural cavity blood sample and then highlighted the questions raised by variances in the blood alcohol levels from other parts of the victim's body. We find nothing in the denial of the request for Dr. Vasilliades which caused any deficiencies in defense counsel's performance, let alone the serious lapses necessary for us to find ineffective assistance. The asserted error lacks merit.

SUPPRESSION OF THE DEFENSE ACCIDENT RECONSTRUCTION REPORT

Appellant maintains the military judge erred by denying the admission of the defense expert's accident reconstruction report. We disagree. The report was prepared solely for the defense in anticipation of the court-martial. The expert testified he drafted it "because it satisfied the needs of the defense counsel." As such, it was not prepared "in the course of a regularly conducted business activity," and did not qualify as a hearsay exception. Mil. R. Evid. 803(6); *See Palmer v. Hoffman*, 318 U.S. 109 (1943). In addition, since the expert had already testified extensively about the contents of his report, admitting it

would have been cumulative. Mil. R. Evid. 403. Had we found the judge erred in excluding the report, the cumulative nature of the exhibit averted any prejudice.

ADMISSION OF THE AUTOPSY REPORT

As he did at trial, the appellant again contests the admission of the Air Force autopsy report, citing several "discrepancies and problems." While the defense was able to demonstrate many deviations from proper procedure in the report's preparation, the military judge properly framed the issue: "[W]hether the discrepancies are major or minor." *See United States v. Strozier*, 31 M.J. 283, 288 (C.M.A. 1990). After detailing his findings of fact, the judge concluded the errors were "minor and technical and not so substantial as to render the evidence—in this particular case, the laboratory results—unreliable." The military judge applied the correct standard and did not abuse his discretion in evaluating the facts. *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989). The autopsy report was properly admitted.

SUA SPONTE HEARSAY OBJECTION & IMPARTIALITY

The appellant next contends that the military judge improperly lodged a hearsay objection to the defense expert's testimony, creating the impression he "had abandoned his impartial role." As appellate defense counsel correctly point out, "An impartial and disinterested trial judge is the foundation on which the military justice system rests, and avoiding the appearance of impropriety is as important as avoiding impropriety itself." *United States v. Berman*, 28 M.J. 615, 616 (A.F.C.M.R. 1989). Here, however, we find nothing untoward in the trial judge's actions.

The issue arose as the military judge was posing questions to the defense expert submitted by the court members. One area of questioning dealt with whether the

victim was wearing sunglasses at the time of the accident. The expert said he talked to several people about the victim's habitual use of sunglasses. Then, he said

> WIT: So I'm left with the assumption he's either driving without glasses or maybe with the sunglasses on. I talked to another witness who told me he'd gone out there with—
>
> MJ: Okay, you're repeating statements from other people. We don't have those people in the court here today to be able to question them.
>
> WIT: You may have one of them, may have one of them here, sir. Because I believe it was Sergeant Foley who told me what I'm about ready to say.
>
> DC: Your Honor, I believe as an expert, he can rely on others' opinions and testimony in order to form his opinions. So I don't think that would be a problem here.
>
> WIT: To wrap it up, the quick answer is, sunglasses were found at the scene of the accident there where Sergeant Sauceda was laying.
>
> MBR: (Senior Master Sergeant G) Excuse me, sergeant, could you repeat that last sentence?
>
> WIT: The sunglasses were found with broken lenses laying right next to where Sergeant Sauceda, his final resting position was, near that guard rail.
>
> MJ: Members, any other questions? (A negative [reply.])

We find nothing inappropriate in the military judge's remark. Under Mil. R. Evid. 703, experts can rely on hearsay statements in forming their opinions, but those outside statements should not enter the case for "the truth of the matter asserted." *See United States v. Neeley,* 25 M.J. 105 (C.M.A. 1987). This witness, for example, might have said "I formed the opinion that the

victim's sunglasses contributed to the accident because I was told his sunglasses were found next to his body," but not simply, "Witnesses told me the victim's sunglasses were found next to his body." The judge's comment did nothing more than attempt to help the witness follow this somewhat difficult distinction.[2] The remark was neither a "hearsay objection" nor any repudiation of the military judge's impartiality.

TRIAL COUNSEL'S FINDING ARGUMENT

The culpably negligent act alleged against the appellant was allowing Sergeant Sauceda to drive appellant's car "while under the influence of alcohol." At trial, the appellant tried to show that Sauceda was not impaired, or at least did not appear impaired to those around him. In addition, the defense attempted to establish that the poor condition of the appellant's automobile was the proximate cause of the victim's death. Here, the appellant contends the prosecutor unethically suggested in findings argument that the members could find him culpably negligent because of the evidence of the car's faulty state of repair.

We view trial counsel's argument differently. In it, he pointed out to the members that the car had been inspected two months before the accident and the appellant felt comfortable enough with the car's safety to let his wife drive it. The thrust of the prosecutor's entire argument was that the car's condition did *not* cause the accident. Appellant's counsel voiced no objection to any of the trial counsel's comments. Then, in her own argument on findings, the defense counsel stressed that defects in the car were one of many possible intervening causes of the victim's death. The military judge instructed the members about their duties and responsibilities, the elements

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[2] Although, as government counsel note in their brief, the hearsay testimony about where the sunglasses were found came in anyway.

of the offense, and the definitions of terms such as "culpable negligence" and "independent intervening cause." For them to find the appellant guilty of the lesser included offense of negligent homicide—which they did—the judge specifically told the members they had to find that Sergeant Sauceda's death "resulted from the act of the accused by allowing Sergeant Sauceda to drive the accused's vehicle while under the influence of alcohol." Neither trial counsel's argument nor the judge's instructions suggested that the appellant could be held criminally responsible for the condition of his car.

DEFENSE SENTENCING ARGUMENT & INEFFECTIVE ASSISTANCE

Appellant also contends his defense counsel's sentencing argument amounted to ineffective assistance because it equated to a categorical plea for a bad-conduct discharge rather than a plea for a discharge in lieu of confinement. Applying the standards for evaluating ineffective assistance of counsel set out above, we find to the contrary.

At the outset, we detect no deficiencies in the defense counsel's argument sufficient to meet the first prong of the *Strickland* ineffectiveness test. The appellant requested that his counsel argue for a bad-conduct discharge in lieu of confinement. The military judge conducted a thorough inquiry to insure the appellant understood the ramifications of that request. Then, the defense counsel carried the appellant's request to the members, mentioning no fewer than four times that the appellant wanted no confinement. In the final portion of the argument, the defense counsel said, "Again, Sergeant Martinez asks that you give him a bad-conduct discharge in lieu of confinement." Reviewing the entire argument in context, we find that counsel capably pursued the appellant's wishes.

Had we found counsel's argument inadequate, we would not have found it prejudicial—the second prong of

the *Strickland* test. The appellant received exactly what he told the judge he wanted—a bad-conduct discharge and no confinement. Appellant argues that, but for his counsel's sentencing argument, he would have received no bad-conduct discharge *and* no confinement. The nature of this offense coupled with the appellant's prior nonjudicial punishment for driving while intoxicated convinces us otherwise.

COMMAND INFLUENCE

Finally, appellant complains he was denied a fair trial because his wing commander engaged in unlawful command influence over the members who heard his case. Again, we disagree.

On 5 March 1991, the Zaragoza wing commander issued a "We Care About You" letter to his command after a series of alcohol-related accidents, presumably including this one, resulted in several deaths. The letter expressed the wing leadership's concerns and reviewed the administrative and nonjudicial measures being set in motion to reduce alcohol-related incidents.

We differ with the appellate defense counsel's assessment that "this letter cast an atmosphere of command influence that hung over appellant's trial like the Sword of Damocles." The letter specifically says that "Punishment for DUI [driving under the influence] will be individualized under the guidelines of the UCMJ." As counsel suggests, the letter was circulated across the base "eight days before the appellant's trial began." However, due to the delays mentioned above, the members were not actually empaneled until almost 2 months after the letter was written. Then, in an extensive *voir dire*, the members stated repeatedly they would only consider the facts of the case before them. Their actions remained fair and impartial throughout the trial. We find nothing from the 5 March letter that had the impermissible effect of bringing "the commander into the deliberation room", and

nothing amounting to unlawful command influence over these proceedings. *United States v. Kirkpatrick*, 33 M.J. 132, 133 (C.M.A. 1991); *United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983); *United States v. Fowle*, 7 U.S.C.M.A. 349, 351, 22 C.M.R. 139, 141 (1956).

Therefore, having examined the record of trial, the assignment of errors, and the government's reply thereto, we conclude that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the appellant's substantial rights was committed. The findings of guilty and the sentence are

AFFIRMED.

Senior Judge O'HAIR and Judge HEIMBURG concur.

[SEAL]

OFFICIAL

/s/ Naomi D. Allen
NAOMI D. ALLEN
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Chief Court Administrator, AFCMR

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